

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0439-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMON ROUNDTREE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Damon Roundtree appeals from his judgment of conviction for disorderly conduct in violation of § 947.01, STATS., and from an order denying his postconviction motion to modify his sentence. Roundtree claims two instances of trial court error warranting resentencing: (1) the trial court erroneously exercised its sentencing discretion by imposing an excessive sentence; and (2) the trial court violated his right to due process by relying on untrue or incorrect information in determining his sentence. Because the trial court did not erroneously exercise its sentencing discretion and because

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

the basis for the trial court's sentence was accurate and properly considered, this court affirms.

I. BACKGROUND

Roundtree was charged with one count of disorderly conduct, a misdemeanor, in violation of § 947.01, STATS. On March 30, 1995, Roundtree pled guilty to the charge. He stipulated to the following facts: (1) that he violated a court order to stay away from the victim; and (2) that the circumstances of this incident were argumentative and frightened the victim. The trial court found him guilty and sentenced him to the maximum sentence of ninety days in the House of Correction. He filed a postconviction motion challenging the sentence, which the trial court denied. Roundtree now appeals.

II. DISCUSSION

A. *Excessive Sentence.*

Roundtree first claims the trial court erroneously exercised its sentencing discretion by imposing an excessive sentence. To lend support for his assertion, he argues the sentence which he received is not supported by the facts and information of record. In addition, he argues that the trial court gave undue weight to unsubstantiated statements of the victim, while ignoring Roundtree's character and the stipulated facts of the offense.

Standard of Review

Sentencing is a function of trial court discretion. *State v. Harris*, 119 Wis.2d 612, 622, 350 N.W.2d 633, 638 (1984). We are reluctant to interfere with a trial court's sentence because it has a great advantage in considering the relevant factors and the demeanor of the defendant. *Id.* There is a presumption that a trial court acted reasonably when sentencing. *Id.* Thus, to demonstrate an erroneous exercise of sentencing discretion, the defendant must show some unreasonable or unjustifiable basis in the record for the sentence imposed.

State v. Echols, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640, *cert. denied*, 114 S.Ct. 246 (1993).

Analysis

When sentencing, the trial court must consider the following three factors: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The significance of each factor, however, in the total sentencing process lies solely within the sentencing court's discretion as demonstrated by the record. *State v. Patino*, 177 Wis.2d 348, 385, 502 N.W.2d 601, 616 (Ct. App. 1993). Moreover, this court will not find that the sentence imposed by the trial court was excessive unless "the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Dietzen*, 164 Wis.2d 205, 213, 474 N.W.2d 753, 756 (Ct. App. 1991).

When considering the three primary factors, the sentencing court may also take into account: the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention. *State v. Borrell*, 167 Wis.2d 749, 773-74, 482 N.W.2d 883, 891 (1992).

From a review of the sentencing transcript, this court is satisfied that the trial court properly exercised its discretion in sentencing Roundtree. Prior to sentencing, the trial court, with inquiring diligence, listened to the presentencing remarks of the district attorney, Roundtree's counsel and the victim. It also considered Roundtree's elocution. It then rendered its oral sentence which we recite in *toto*:

THE COURT: What I have to do is consider Mr. Roundtree's background and character. I take into account his education, his additional college football scholarship, work history, energetic history of work, and I take into account his willingness to abuse this woman repeatedly to disregard humanity to beat up someone who is not as strong as he and to lie here in court by denying all of this conduct.

The crime here is disorderly conduct for terrorizing Ms. Smitts on one day. The history is much more serious than that, and I take all of this into account as I'm required to under law.

I am not assuming that Mr. Roundtree is guilty of the other crimes that he's accused of. We'll have a [trial] on that beginning next Tuesday, but at this particular time it was committed at a time when Mr. Roundtree was out on bail for the other offense.

Balancing all the factors, it is the sentence of this court that Mr. Roundtree serve a term of ninety days in the House of Correction straight time at the House of Correction beginning now.

Further explication is not necessary. It is self evident that the trial court considered the mandatory factors and then also took into account optional factors in imposing its sentence. Based on the circumstances in this case, this court cannot say that a ninety sentence is so excessive and disproportionate so as to "shock public sentiment." Moreover, the sentence did not exceed the maximum sentence, and accordingly, was not excessive. *See Ocanas v. State*, 70 Wis.2d 179, 233 N.W.2d 457 (1975). This court concludes, therefore, that the trial court did not erroneously exercise its sentencing discretion.

B. Due Process.

Roundtree also claims that his due process rights were violated when the sentencing court relied on untruthful or incorrect information as a basis for its sentencing.

Standard of Review

The constitutional question of whether Roundtree's rights to due process were protected presents a question of law which we review *de novo*. *State v. Littrup*, 164 Wis.2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991). To “establish a due process violation in the sentencing process, a defendant has the burden of proving by clear and convincing evidence both” the inaccuracy of information relied upon by the sentencing court and that the reliance was prejudicial. *Id.* at 132, 473 N.W.2d at 168. Whether a defendant has met his or her burden of proof is also a question of law, which is reviewed *de novo*. *Id.* at 126, 473 N.W.2d at 166; *State v. Windom*, 169 Wis.2d 341, 349, 485 N.W.2d 832, 834 (Ct. App. 1992).

Analysis

The bases for this claim of error are the contents of statements made by the victim of the disorderly conduct offense which included information about abuse she had received at the hands of Roundtree prior to and after the present offense. Her statements were supported by pictures offered to the trial court. The record of the sentencing modification hearing, however, refutes Roundtree's assertion that this evidence was untruthful or incorrect. Succinctly, the trial court stated:

Ms. Schmitz reported about some of the other things that Mr. Roundtree did to her, but that's not what I sentenced him for. What I sentenced him for was his background and his character and primarily how to protect the people of the community in the future.

There is nothing in the record to demonstrate that the sentencing court based its disposition on anything but proper factors. Accordingly,

Roundtree's claim fails. This court affirms the sentencing of the trial court.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.